

*Charles Schwab & Co., Inc.*  
101 Montgomery St.  
San Francisco, CA 94104

May 24, 2005

Barbara Z. Sweeney  
Office of Corporate Secretary  
NASD  
1735 K Street, NW  
Washington, DC 20006-1500

**Re: Request for Comment on NASD NTM 05-25**  
(Proposal to Require Pre-Use Filing of Sales Material for New Types of Securities  
and Television, Video, and Radio Advertisements)

Dear Ms. Sweeney:

Charles Schwab & Co., Inc. (“Schwab”) welcomes this opportunity to comment on NASD’s proposed rule changes to require pre-use filing of sales material for “new types of securities,” and television, video, and radio advertisements. While we commend the NASD for its desire to identify and address sales practice and advertising concerns associated with sales of new types of securities and broadcast advertising, we are concerned about several aspects of the new proposal. For example, as is more specifically described below, we feel obliged to note the potential ambiguity inherent in the proposal to require pre-use filing of sales literature “concerning a type of security that the member has not previously offered.” In addition, we wish to address the suggestion in the Notice to Members that regulatory review of sales practice controls will be incorporated as part of the advertising review process. Finally, we feel that the impact of the proposal to pre-file television, radio and video advertisements will work against the best interests of members and investors alike. We believe there may be an alternative, such as pre-filing of certain materials, provided both that use of such advertisements is permitted after such filing, and video advertisements and certain general brokerage television and radio advertisements are excluded from the filing requirements.

These and our other comments are discussed in greater detail below.

**Sales Material Concerning New Types of Securities**

We believe that the proposal to require pre-use filing of advertisements and sales literature for new types of securities may prove, in practice, to represent an expansion of NASD advertising rules that may be neither warranted nor necessary. To effectively address NASD’s

concerns about sales practices associated with new types of securities, we would recommend, as an alternative, increased emphasis on those concerns through NASD's examination program. With respect to issues raised by the advertising of new types of securities, we believe post-use filing may be the more appropriate solution.

NASD's proposal requires pre-use filing of advertisements and sales literature for a "type of security that the member has not previously offered," a term that, as NASD itself acknowledges in the accompanying release, "may raise interpretive issues." We agree, and believe that NASD should clarify the meaning of the term if it determines to move forward with this aspect of the proposal. Ambiguities, in the form of reasonable differences of opinion over what constitutes a "type of security that the member has not previously offered," could have the unintended consequence of unfairly subjecting members to regulatory action or disparate regulatory oversight and, in an environment where there is a tendency to err on the side of caution, result in unnecessary filings with resulting expense and delay. We suggest that NASD define with added specificity those particular types of securities that are raising regulatory concerns.

NASD NTM 05-25 states that the pre-filing requirement for new types of investments should provide NASD with more time to address any sales practice issues that the new type of security presents. This could be interpreted to suggest an expansion of the scope of NASD advertising review to include investigations of supervisory policies, internal controls, sales practice procedures and training materials associated with the new product that is the subject of the filed material. While we agree that these sales practice issues are a critical component of any new product launch, we question whether NASD oversight of sales practice issues should be conducted by the Advertising Department in the course of their review of advertising and sales literature for consistency with NASD Rule 2210 requirements. Such an expanded sales practice focus would appear to represent a material change in the scope of responsibility of that area, requiring different levels of expertise and greater resources for the Advertising Department, and significantly broadening the scope of regulatory requests and information production in the advertising review process. In our view, existing NASD examination processes afford effective oversight of sales practices associated with new products.

The requirement to withhold material regarding new securities from publication until changes requested by NASD have been made could affect product launch dates. This concern is heightened if the review includes examination of related sales practice controls and processes. In some instances, NASD staff may require extra time to become familiar with the new product, possibly creating additional delays in response times. We do not believe delays associated with a pre-filing requirement would serve the best interests of investors who may benefit from the availability of the new product. We believe a post-use filing requirement will allow for sufficient review of the advertising issues associated with new securities.

With regard to whether a filing requirement should include advertisements and sales literature for current products being offered to a new class of investors for the first time, our view is that there would be no significant investor benefit to support this approach. Advertising and

sales literature for current product offerings are already required to undergo review by firm principals for compliance with the general and specific standards of NASD Rule 2210, and the firm and its principals have experience with the product. While the sale of existing products to a new class of customers may raise new sales practice and communication issues that require consideration in the development of sales material, we do not believe that a pre-use filing requirement is warranted where the firm has prior experience selling and advertising the product.

Advertising and sales literature concerning registered investment companies, in most cases, will have been filed with NASD. The current requirement to file these communications when they are reformatted for a new audience within 10 business days of first use is in our opinion sufficient to address any concerns that NASD might have for these products.

With respect to sales materials already subject to filing requirements, such as mutual fund sales materials, we agree with NASD they should not be subject to a new, pre-use filing requirement. Because such materials are currently required to be filed within 10 days of first use, we believe a pre-filing requirement is unnecessary and would create duplicative filing standards.

### **Television, Video, and Radio Advertisements**

NASD's proposal requires television and radio advertisements of 15 seconds or longer to be filed with NASD at least 10 business days prior to use, but provides that this requirement may be met by filing a "draft version" or "story board" of the advertisement. The "final filmed version" must be filed within 10 business days of first use. The proposal additionally requires a member to "withhold use of the advertisement until changes specified by the Department have been made." The impact of this proposal is to preclude a member from placing any television or radio advertisements that are 15 seconds or longer until the Department has first reviewed and approved them.

Schwab does not necessarily object to pre-use filing of television and radio advertisements. However, in our experience, the period of time that typically elapses between the date an advertisement is filed and the subsequent receipt of NASD comments is too long to make this proposal practicable. We are concerned that prohibiting use of these advertisements "until any changes specified by the Department have been made" will result in significant delays in members' use of advertising without providing any corollary benefit to investors. In fact, to the extent that a member may choose to utilize such media to communicate important information that may be responsive to current events affecting the financial markets, the proposal could have the unintended consequence of making the timely provision of that information all but impossible.

For example, Schwab estimates that over the period extending to the end of this year, it may be producing as many as 37 television, radio, and video advertisements that, under the proposed rule, could require prior Department review and approval. In addition to any expense associated with review (including fees assessed by NASD for expedited review) of such a

volume of items, we wonder at the effect on the Department of similar levels of advertising activity by some or many of the other 5,000 member firms. If the Department is not staffed to handle that level of activity, and if there is not a commensurate commitment to the timeliness of that review, then the result is likely to be a bottleneck of significant proportions. We would ask whether the resulting delays would be in the best interests of investors, let alone of NASD and its member firms.

Schwab's experience suggests that these concerns are not illusory. Television and radio advertisements concerning registered investment companies currently must be filed with NASD within 10 business days of first use. Schwab's experience is such that we typically do not receive comments from NASD staff for as long as several weeks after filing. Requests for expedited review can currently be denied due to backlogs. We fear that expanding the filing requirements for all NASD members will in all likelihood compound the current delays. As a result, we feel that the proposal may have the undesirable effect of restricting a member's ability to utilize an advertisement for as long as several weeks (or even months) after filing, which would be, at best, counterproductive and, at worst, a serious constraint. In addition, it could have a very serious impact on the expense associated with this form of advertising given inherent factors such as tight production schedules and the costs of reserving media time.

We know it is not the NASD's intent to create an intractable situation. Balancing all interests, we believe it is sufficient for NASD to require pre-use filing of the draft versions of television and radio advertisements, and post-use filing of the final versions, provided that members are permitted to use these advertisements after the pre-use filing.

### **General Brokerage TV and Radio Advertisements**

Schwab urges NASD to exclude from its proposed pre-filing requirements general brokerage TV and radio advertisements. These advertisements generally do not promote specific investment products and consequently, do not present significant investor protection issues. Such advertisements are most often used to reinforce branding in the marketplace. We foresee no significant investor interest that would be advanced by subjecting such general advertisements to a pre-filing requirement.

### **Video Advertisements**

We also recommend that video advertisements be excluded from a pre-use filing requirement. Videos are not broadcast to the public in the same manner as television and radio advertisements, and are only seen by those investors who have affirmatively chosen to avail themselves of the video content.

Schwab typically uses videos on our web site, in investor centers, and in other presentations for educational purposes and to highlight brokerage services. We believe video content of an educational or brokerage service nature does not pose great risks to the investing public. Also note, video content that relates to registered investment products currently is

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subject to filing requirements. As stated earlier, a pre-use filing requirement for this content is unnecessary and would create duplicative filing standards.

Additionally, we feel it is important to emphasize that certain video advertisements are very time-sensitive. For example, a member may have one of its representatives record a presentation for broadcast on its Web site or in its retail branches in response to a particular event that may have implications for the financial markets. Requiring the approval of these messages by NASD prior to use could delay the “broadcast” of that video and would greatly reduce or even eliminate the relevance of its content.

Considering the relatively limited audience for video advertisements and the importance of a member’s ability to quickly update or change video and web content in response to current events, we believe there should be less reason for regulatory concern. We would therefore recommend a “file within 10 days of first use” approach as one most likely to balance the risk of harm and the benefits of maintaining a flexible, constructive flow of information between members and investors.

#### **Compliance with New Requirements**

We request that the compliance period for any new pre-filing requirements be a minimum of six months. Sufficient time will be needed for firms to implement new review and filing procedures as well as changes to advertising production schedules.

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We appreciate this opportunity to comment on NASD’s proposal. If you have any questions about our comments or need additional information, please contact me at (415) 636-3540.

Sincerely,

*Bari Havlik*

Bari Havlik  
SVP, Global Compliance